IN THE

Supreme Court of the United States

JAN 14 19
MICHAEL RODAK, JR.

October Term, 1973

No. 73-1102

TRANSCON LINES,

Petitioner,

vs.

XEROX CORPORATION,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California.

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Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

This is an action against a common carrier on a freight claim arising from a shipment in interstate commerce.

Petitioner, the defendant and respondent below, respectfully prays that a writ of certiorari issue to review a decision of the Court of Appeal, Second Appellate District, State of California, filed August 21, 1973. Petition for rehearing in said court was denied. Petition for hearing in the Supreme Court of California was denied on October 18, 1973. The decision for which review is sought, which was not published, reversed a summary judgment of the Superior Court of the State of California for the County of Los Angeles, in favor of defendant and respondent in that court, petitioner herein, entered June 12, 1972.

Opinion Below.

The opinion of the Court of Appeal, Second Appellate District, State of California, filed August 21, 1973 is printed in Appendix "A" annexed to this petition. Also printed in Appendix "A" is a copy of the order by said court denying rehearing. A copy of the order by the Supreme Court of California denying a hearing dated October 18, 1973 is also printed in Appendix "A".

Jurisdiction.

The statutory provision which confers jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. Sec. 1257(3). The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. Sec. 20(11) is the statute of the United States determining the rights of the parties. Also involved is Sec. 2(b) of the terms and conditions of the Uniform Domestic Straight Bill of Lading prescribed by the Interstate Commerce Commission in accordance with said statute. The federal question is whether or not the declination in writing by petitioner herein on April 10, 1969 of the freight claim filed by respondent herein, started the two year and one day period of Section 2 (b) of the Bill of Lading running. Said declination occurred more than two years and one day before respondent herein filed its lawsuit on June 16, 1971. Said question was first raised in the Superior Court in the first affirmative defense in the answer of petitioner herein to the complaint of respondent herein in said lawsuit (para. 25 of said Answer to Complaint).

Said federal question was next raised in said Superior Court in the notice of motion for order for summary judgment in favor of defendant Transcon Lines, filed in said Superior Court on February 14, 1972, and the motion on the hearing thereof on March 16, 1972, was denied.

Thereafter on March 31, 1972, a notice of motion to reconsider the ruling denying defendant's motion for summary judgment was filed. At the hearing thereof on May 3, 1972 said motion was granted, and the order of March 6, 1972 was vacated, and at said time defendant's motion for entry of summary judgment and to dismiss the complaint was granted.

Thereafter a notice of appeal was filed in the State Appellate Court by plaintiff and appellant Xerox Corporation on June 20, 1972. The brief and opinion in the Court of Appeal all involve the federal question first raised in the Superior Court. The action, though involving interstate commerce, is authorized to be filed in the State Court in the Carmack Amendment itself, 49 U.S.C. Section 20(11).

Question Presented.

In freight shipments in interstate commerce under the Uniform Domestic Straight Bill of Lading, when is a written notice disallowing a claim or some part of it, given under Section 2(b) of said Bill of Lading by the Carrier to the Claimant, sufficiently definite as to disallow the claim or some portion of it so as to start the running of the two year and one day limitation period within which lawsuits on such claims must be filed?

Statutes Involved.

49 U.S.C. Sec. 20(11); 49 U.S.C. Sec. 319; Rule 977 of California Rules of Court (effective January 1, 1974); Section 2(b) of the Uniform Domestic Straight Bill of Lading, the text of all of these being set forth in the Appendix hereto.

Statement of Facts.

On October 28, 1968, Xerox delivered to Transcon at the Xerox plant in Blauvelt, New York, three shipping containers described on the bill of lading as "Machines, copying, duplicating or reproducing" for carriage, consigned to Bekins Moving and Storage in San Antonio, Texas. Said shipment was delivered November 7, 1968 by Merchants Fast Motor Lines, Inc. who as a connecting carrier, received the shipment from Transcon, and at the time of delivery, the consignee Bekins signed for the receipt of the shipment from the carrier, clear, no exception having been taken to the condition of the shipment at the time of delivery. Subsequently, inspection was requested by Bekins on behalf of Xerox on November 19, 1968, said request being directed to the delivering carrier, Merchants Fast Motor Lines, Inc. On November 20, 1968, the freight inspector from Merchants Fast Motor Lines made the inspection of the shipment and prepared a report of his inspection. Thereafter on February 19, 1969, Xerox filed a claim with the claim agent of Transcon Lines at Newburg, New York for $22,546.00. Claimant's Number being E111128 DO. On April 10, 1969 Transcon sent

Xerox a notice in writing declining the claim filed by Xerox on February 19, 1969 on the October 28, 1968 shipment, stating in said notice, "Your claim was denied for the following reason: Shipment was delivered 'Clear'." On April 17, 1969, Xerox wrote Transcon returning the claim papers and requesting reprocessing of the claim and at the beginning of the second paragraph of said letter stated: "You have declined our claim indicating that the shipment was delivered 'clear'."

The claim was reprocessed and reinvestigated and additional correspondence was exchanged and again on October 1, 1969, Transcon sent Xerox a letter declining the claim. The lawsuit in the Superior Court for the State of California, County of Los Angeles, was filed June 16, 1971, which was more than two years and one day after the first notice, dated April 10, 1969, was given in writing declining the claim.

In the original court ruling on March 16, 1972, Judge Berg in denying the motion for summary judgment stated: "Whether there was an unequivocal disallowance presents a possible question of surrounding facts, circumstances or customs which should be resolved upon a trial of the issues." Upon the motion to reconsider the decision denying the motion for summary judgment and for summary judgment which was heard in the Superior Court on May 3, 1972, Judge Berg in granting the motion to reconsider his earlier denial and in granting summary judgment stated: "We feel that the motion actually is well taken, that interpreta-

tion and intent of the parties would have no bearing on the resolution of this legal issue." The Court thereby determined that the decision as to whether or not a notice was an unequivocal disallowance of a freight claim was a matter of law which the Court would determine from the writing of April 10, 1969, itself. In this connection the Court construed the notice of April 10, 1969, given by the carrier Transcon to the claimant Xerox as an unequivocal disallowance of Xerox's said claim.

The Court of Appeal, Second Appellate District, State of California, in its opinion filed August 21, 1973, agreed with the lower Court that the determination as to whether or not a notice in writing by the carrier to the claimant was an unequivocal disallowance under Section 2(b) of the terms and conditions of the Uniform Domestic Straight Bill of Lading was a matter of law to be determined solely from the notice itself. Said Court then construed the notice of April 10, 1969, to be an indefinite disallowance and therefore equivocal. The petition for rehearing in the Court of Appeal was denied and the petition for hearing in the Supreme Court of the State of California was denied on October 18, 1973.

REASONS FOR ALLOWANCE OF THE WRIT.

The Supreme Court of the United States has not previously stated in any written opinion what the requirements are of a notice in writing disallowing a freight claim against a carrier or any part or parts of the claim specified in the notice. The Supreme Court of the United States is urged to grant the petition in this matter and consider the question presented for a number of reasons.

In the opinion of the Court of Appeal of California filed August 21, 1973, the conclusion as a matter of law that the written notice of April 10, 1969, was not an unequivocal rejection of the claim is not supported by the decisions of the other courts in the United States that have heard and considered cases involving the two year and one day limitation found in Section 2(b) of the Uniform Domestic Straight Bill of Lading. Under those decisions, it would appear that the notice of April 10, 1969, was a definite disallowance of the freight claim filed by Xerox, and the period of two years and one day should have commenced with the sending of that letter. At page 6 of the opinion in the Court of Appeal, the Court comments that if Transcon had merely stated that the Xerox claim was declined, the disallowance would have conformed with the language of both the federal statute and the bill of lading and the limitations period would have started to run. Because Transcon used a form which after declining the claim listed a number of reasons which could be checked to indicate the reason for the declination and because some of those reasons elicited reconsideration of at least a part of the claim as filed, the court said the words "your claim declined" did not

always necessarily constitute a *final* rejection. As a matter of law the Court concluded that the notice of April 10, 1969 was not an unequivocal rejection, but "left the door open" for further review of Xerox's claim for concealed damage.

To understand why this decision is against the weight of authority, reference to the language of the Federal statute, to the terms and conditions of the Uniform Bill of Lading and to the pertinent cases is in order.

The statutory basis for the filing of claims against carriers on freight moving in interstate commerce by common carrier is found in 49 U.S.C. Sec. 20(11). Near the end of the paragraph, it provides in part:

> "That it shall be unlawful for any receiving or delivering carrier to provide by rule, contract, regulation or otherwise, a shorter period for the filing of claims than nine months and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice."

Although the quoted section is found in what is commonly called the Carmack Amendment to the Hepburn Act and did not apply to motor freight common carriers when it first became law, because such carriers were not then regulated under the Interstate Commerce Act, it was made applicable to motor freight common carriers in 1935 by the passage of Part 2 of the Interstate Commerce Act commonly known as the Motor Carrier Act. Section 319 of the Motor Carrier Act,

usually cited as 49 U.S.C. Section 319, specifically makes Sections 20(11) and (12) applicable to motor carriers. The Interstate Commerce Commission as described in 52 Interstate Commerce Reports at page 671 and thereafter, after holding hearings in which both carrier and shippers participated, adopted the Uniform Domestic Straight Bill of Lading. When adopted, Section 2(b) of said Bill of Lading provided that as a condition precedent to recovery, claims must be filed in writing with the carriers designated therein within six months after delivery of the property and suit shall be instituted only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. In 1930 the six-month period was changed to nine months. The language of Sec. 2(b) of the terms and conditions of the Uniform Bill of Lading has remained virtually unchanged since 1930.

Under the plan for the handling of freight claims set forth in the Statute and the Bill of Lading, the first important date is the date on which a shipment is delivered. The claimant must file his claim in writing with the carrier within nine months thereafter. Since these are expressly made conditions precedent, the failure to file a claim in writing with the carrier within nine months after a shipment is delivered extinguishes carrier liability for claims.

The time for investigation by the carrier of claims properly filed is not limited by the statute and the claimant is not charged under the statute with the time it takes the carrier to investigate the claim and reach a decision as to whether to allow or disallow the

claim. If the carrier decides to allow the claim as filed and does not decline the claim or any part of the claim, the carrier proceeds to pay the claim and neither the statute nor the bill of lading provision need be considered. If the carrier gives the shipper or consignee a notice in writing disallowing the claim or any part or parts thereof specified in the notice, the shipper then has two years and one day from the date on which such notice is given within which to reach an agreement with the carrier as to the amount of the claim which the carrier will pay and conclude payment or to file a lawsuit on the disallowed claim.

Under the language of both Sec. 20(11) of the Carmack Amendment and Section 2(b) of the Bill of Lading, it is contemplated that a notice may be sent by the carrier to the claimant disallowing a portion of a claim only and that such notice will be sufficient to start the two year and one day period running. There is no statutory or bill of lading restriction stating that the notice of disallowance may contain the declination and nothing else, nor is there any attempted prescription as to the contents of the notice except that it disallow the claim or any part or parts thereof specified in the notice. There is no prescription against the notice disallowing a part of the claim and allowing part of the claim. Such letters were held to have started the period running in *Burns et al. v. Chicago, Milwaukee, St. Paul and Pacific Railway Co.*, 192 F.2d 472, decided by the United States Court of Appeals, 8th Circuit, on November 12, 1951, the leading case on the subject, and in *H. Rouw Co. v. Texas & N.O.R. Co.*, 260 S.W.2d 130 (CCA, Texas, 1953), the *Burns* case having been cited with approval in *Hangar v. Allied Van Lines* (Dist. Col. Ct. of App. 1964) 204

A.2d 420, and *Holford v. Louisville & Nashville Railway Co.* (U.S. Dist. Ct., W.D. Tenn. 1967) 266 Fed. Supp. 408.

There is no authority, apart from the opinion in the court below in this case, which supports the view that a notice in writing stating as it does "Your claim declined." is not the notice in writing that will start the running of the two year and one day period prescribed in Section 2(b) of the Uniform Bill. The only case cited by Xerox in all of these proceedings in support of their position as to the notice itself is *Robinson v. Trustees of New York, New Haven & Hartford Railway Co.*, (S.J.C. of Mass., April, 1945) 16 N.E.2d 593, a case which actually is not in point. The notice in that case said that the carrier intended to decline the claim at a future time. It is understandable that the court felt that such a notice was not the notice of disallowance described in Section 2(b) of the Uniform Bill of Lading. To find out whether the carrier acted upon its intention you would have to wait until the future date to see whether or not at that time the carrier followed through on its intention and actually declined the claim. If it did not, then no declination would actually have occurred and the period would not have started running.

The tendency, which results from the opinion of the Appellate Court of California, to restrict the wording of the declination that will start the two year and one day period running to the formula set out in the opinion would, if applied, work very badly in the day to day transactions respecting claims between carriers and shippers. It also would be most unfair to the carriers. At the time that the carrier concludes its investigation

of a claim, the carrier normally notifies the shipper as to the results of the carrier investigation. If a claim as filed is allowed, the carrier notifies the shipper of that fact and usually pays the claim shortly thereafter. If the carrier disallows the claim as filed either by disallowing any specified parts of it or the whole of the claim, it makes sense that the carrier not only will tell the shipper of the decision to disallow certain specified parts of the claim or the whole thereof but also to give the reasons for such disallowance. Reasons given for a decision at the time the decision is given make for a better understanding of the decision. Such reasons may further expedite the handling as to that portion of a claim which is allowed. The tenor of carrier-shipper relations with respect to claims is improved with a statement of the reasons accompanying the declination of a claim. However, if a carrier by stating the reasons for disallowing a claim jeopardizes the effect of the disallowance itself in starting the two year and one day period, carriers will tend to eliminate the statement of reasons upon which a disallowance is based when notifying a shipper that his claim is disallowed in whole or in part. It is important to both carrier and shipper to know whether or not a notice given by a carrier to shipper commences the running of the two year and one day period within which to file a lawsuit. Record storage at the motor freight terminal level has become such a problem that many large motor freight carriers destroy their terminal records after three years from the date of delivery. Hopefully in connection with shipments on which claims have been filed, those records will be gathered in the claim file and will be preserved. However, with the central handling of claims at carrier headquarters, the danger of destroying records needed

in the handling of claims is a real one. Shippers too, have had a very real problem of record retention for longer than it is necessary to retain the record.

The opinion of the court below results in unequal treatment of carriers and shippers under the Interstate Commerce Act. Equal treatment was clearly prescribed by the Supreme Court of the United States in the case *Mid-State Horticulture Company, Inc. v. Pennsylvania Railroad Co.*, (1943) 320 U.S. 356, particularly at pages 361, 362 and 363. Under Section 2(b) of the Uniform Bill of Lading, the decisions have increasingly relaxed the requirements as to the writing to be filed by the shipper with the carrier within the nine-months period to constitute a valid claim. These cases culminate with the case of *Thayer v. Pacific Electric Railway Co.*, (S.Ct. of Calif. 1961) 55 Cal.2d 430, in which a notation "Damage on this shipment, 4/20/55, C. D. Hileman." made on the freight bill by the carrier's agent while in the plaintiff's office at the time the carrier's agent collected the freight charges from the plaintiff therein, was held to constitute a claim filed with the carrier in compliance with Section 2(b) of the Uniform Domestic Bill of Lading.

Based in part on the view of the Supreme Court of the United States in *Mid-State Horticulture Company, Inc. v. Pennsylvania Railroad Co., supra*, the decision in the *Burns* case, *supra*, and in the *Rouw* case, *supra*, had the effect of clarifying the law as to minimizing formal requirements with respect to the notice of declination and of construing a notice in writing which fairly conveyed to the shipper the fact that at least a portion of the claim as filed was declined by the carrier as sufficient to start the running of the two year and

one day limitation on the filing of suits regardless of what else was contained in the notice. To say that when it comes to considering whether a shipper has filed a claim properly under Section 2(b) almost any writing is sufficient but that when it comes to considering the carrier's disallowance of the claim, the carrier has to meet formal requirements or the disallowance is ineffective, is not to give equal treatment to shipper and carrier under the Interstate Commerce Act.

The concept of *final* disallowance as expressed in the opinion in the Appellate Court below and also in the *Robinson* case, *supra*, is clearly one which has no proper place in this field. The language of the statute involved in describing the notice in writing as "disallowing the claim or any part or parts thereof specified in the notice" indicates that Congress intended that correspondence between shipper and carrier written after the notice of disallowance has been given would not extend or delay or interrupt the running of the two year and one day period. The disallowance of a part of a claim is not a *final* handling of the claim. Additional correspondence may occur discussing the part disallowed, discussing the part of the claim allowed, or discussing the claim as a whole. As the result of such additional discussion, the carrier might well reiterate the position it took in the original notice of disallowance of part of the claim or might change its view as to the disallowance and thereafter accept the claim as a whole as originally filed. If payment occurred of either the portion allowed after acceptance by the shipper, or the claim as a whole within the two year and one day period, there would, of course, be no problem. However, under the cases cited herein, if payment were not made of the portion allowed within the

two year and one day period from the time the notice of disallowance of a portion of the claim was made, a suit could not thereafter be brought with respect to the portion of the claim allowed. This is precisely the holding in the *Rouw* case, *supra.*

The citation of the opinion of the Court of Appeal of California, filed August 21, 1973 though unpublished, is proper under Rule 977 of the California Rules of Court since this appeal is relevant under the doctrine of the law of the case.

Conclusion.

Wherefore, a Writ of Certiorari to the Court of Appeal of California, Second Appellate District, should issue so that the decision of said court in the instant cause may be reviewed by the Supreme Court of the United States.

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Attorney for Petitioner.

ALFRED D. FREIS,
Of Counsel.

APPENDIX "A."

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Xerox Corporation, Plaintiff and Appellant, vs. Transcon Lines, Defendant and Respondent. 2d Civil No. 40963, S.Ct. No. 5347.

Filed: Aug. 21, 1973.

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Berg, Judge Pro Tem. Reversed.

Latham & Watkins, Alan N. Halkett, James W. Daniels, for Plaintiff and Appellant.

Alfred D. Freis, for Defendant and Respondent.

Xerox sued Transcon, a common carrier, to recover damages alleged to have resulted from Transcon's mishandling in shipment of a large copying machine. Transcon obtained a summary judgment and Xerox appeals.

The trial court's granting of summary judgment was grounded on the failure of Xerox to file its action within two years following Transcon's written notice to Xerox disallowing the claim for damages.

Section 2(b) of the Uniform Domestic Bill of Lading which was adopted under the authority of 49 U.S.C., section 20(11)[1] and which covered the interstate ship-

[1]49 U.S.C. section 20(11) provides ". . . that it shall be unlawful for any such receiving or delivering common carrier to provide by rule contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice; . . . ."

ment of Xerox's copying machine provides in pertinent part:

"As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, or carrier in possession of the property when the loss, damage, injury or delay occurred, *within nine months after delivery of the property . . . and suits shall be instituted against any carrier only within two years and one day from the day when notice* in writing is given by the carrier to the claimant that *the carrier has disallowed the claim* or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid." (Emphasis added.)

The machine in question was shipped from New York to Texas in three crates. The damage was discovered upon opening of the crates at the final destination. Xerox filed its claim with Transcon on February 19, 1968 on a "Standard Form for Presentation of Loss and Damage Claims" and accompanied said form with a damage report. That report noted very minor damage to the crates but described major "concealed" damage to the contents.

On April 10, 1969, Transcon replied with yet another form which contained boxes to be checked. By appropriate checks the form stated "[XX] 4. Your claim declined for following reasons: [XX] (a) Shipment was delivered clear."

In an affidavit filed with the court in opposition to the motion for summary judgment, Blaine Ross,

Xerox' Eastern Area Traffic Manager, stated that "delivered clear" means that no visible damage was noted by the consignee on delivery of the shipment.

Xerox, on April 17, 1969, resubmitted its claim, pointed out that it was contending that the damage was "concealed." There followed a considerable exchange of corespondence and telephone contacts between agents for the parties. Transcon led Xerox to believe it was investigating further. In a letter dated July 29, 1969, Transcon stated that the claim had been sent to the delivering carrier "for additional investigation" and that "upon conclusion of their investigation, disposition of your claim will be made." Those negotiations culminated in a second disallowance by Transcon on October 1, 1969. The present action was filed June 16, 1971, 20 months after October 1, 1969, but 26 months after April 10, 1969.

The parties are in agreement and the law is clear that a carrier cannot by express waiver or other conduct estop itself from asserting the bar of a failure to present a claim within 9 months or a failure to file suit within the two year period, (*Thayer v. Pacific Elec. Ry. Co.*, 55 Cal.2d 430; *Burns v. Chicago, M., St. P. & P. R. Co.*, 192 F.2d 472; *Georgia, Fla. & Ala. Ry. v. Blish Co.*, 241 U.S. 191; *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209) which period begins to run from the time of an unequivocal denial of the claim by the carrier. (*Robinson v. Trustees of New York, N.H. & H.R. Co.*, 60 N.E.2d 593, at 598, (Mass. 1945), and *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 53 S.Ct. 278, 77 L.Ed. 619.)

Thus we focus on Xerox' claim that the granting of a summary judgment was improper for the reason that

whether Transcon's notice of April 10, 1969 was an unequivocal and "final" disallowance of the claim presents a triable issue of *fact*. It contends that Transcon's disallowance based upon no visible damage was not responsive to its claim for "concealed damage" and that the subsequent conduct of the parties, while not creating an estoppel, is extrinsic evidence pointing to an interpretation that the notice was equivocal and thus ineffectual.

Where a statute prescribes a notice, which notice affects the rights of the parties, both the interpretation of the statute and a determination of the sufficiency of the notice are questions of law. (Evid. Code, § 310; Code Civ. Proc., § 1858.)

While a plain and unambiguous document does not call for judicial interpretation (*Skidmore v. County of Tuolumne*, 35 Cal.App.2d 525) its meaning is a question of law (*Holtman v. Butterfield*, 51 Cal.App. 89) as is the question of whether the document is or is not ambiguous. (*Barlow v. Frink*, 171 Cal. 165; *Silver v. Beverly Hills Nat. Bank*, 253 Cal.App.2d 1000.) Where a document is ambiguous and extrinsic evidence is offered to explain its meaning, which evidence is not in conflict, the interpretation of the document remains a question of law.

Whether or not the notice of April 10, 1969 constituted an unequivocal rejection of Xerox' claim is a question of law not fact. Our inquiry, however, does not end here. Since we are dealing with a question of law, we must make our own independent interpretation of the documents.

It is true as Transcon points out that neither the Federal statute nor the bill of lading requires that the

carrier give any reason for its rejection of a claim. If Transcon had on April 10, 1969 simply replied that the claim was declined there would be no question but what the limitation period would then have started to run. But Transcon did not do that. Instead it used a form which contained a number of alternative reasons for rejection of a claim.

In addition to the reason "Shipment was delivered clear," the form contains the following other reasons with boxes to be checked where applicable.

"(b) We hold clear delivery receipt and we have not received a request for concealed damage inspection.

"(c) Attached letter is self-explanatory.

"(d) Partial shortage was filled. Amend claim and return.

"(e) Your claim was not filed within the time limit specified under Section 2(b) of the Bill of Lading Contract."

Thus it is clear that the words "Your claim declined" do not always necessarily constitute a final rejection. The form also points up the significance in the industry, or at least the significance to Transcon, of the distinction between visual damage and concealed damage.

We conclude as a matter of law that the written notice of April 10, 1969 was not an unequivocal rejection but as in *Robinson, supra,* "left the door open" for further review of Xerox' claim for concealed damage.

The bill of lading is for the protection of the carrier and limits its exposure to liability and must be strictly interpreted against the carrier. Said another way, any

doubts as to the efficacy of the carrier's notice in setting in motion a period of limitation must be resolved in favor of the shipper.

Transcon's final and unequivocal rejection of Xerox' claim came on October 1, 1969. Since the action is not barred by the 2 year limitation period, the granting of the summary judgment was in error.

The judgment is reversed.

NOT FOR PUBLICATION

Compton, *J.*

We concur:

Roth, *P. J.*
Fleming, *J.*

September 13, 1973.

Court of Appeal, Second Appellate District, Division Two. 2nd Civil 40963.

Xerox Corporation vs. Transcon Lines.

THE COURT: PETITION FOR REHEARING DENIED.

/s/ Clay Robbins
Clerk

Dated: Dec. 6, 1973.

Order Denying Hearing After Judgment by the Court of Appeal.

In the Supreme Court of the State of California, in Bank.

Order Due October 19, 1973.

Xerox Corporation v. Transcon Lines. 2nd District, Division 2, Civil No. 40963.

Respondent's petition for hearing DENIED.

Filed: Oct. 18, 1973.

BURKE,
Acting *Chief Justice*

Dated Dec. 5, 1973.

In the Court of Appeal, Second Appellate District, State of California.

Xerox Corporation, a corporation, *Plaintiff and Appellant, vs.* Transcon Lines, a corporation, *Defendant and Respondent.* 2nd Civil No. 40963.

Appeal from Superior Court of Los Angeles County. Hon. Michael Berg, Judge *pro tem.*

Appellant's Opening Brief.

APPENDIX A.

49 U.S.C. § 20(11):

Provided further, that it shall be unlawful for any such receiving or delivering common carrier to provide by rule contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice; . . .

APPENDIX B.

Section 2(b) "Contract Terms and Conditions" of Uniform Domestic Bill of Lading;

2(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, or carrier in possession of the property when the loss, damage, injury or delay occurred, *within nine months after delivery of the property* (or, in the case of export traffic, within nine months after delivery at port of export) or, in the case of failure to make delivery, then within nine months after a reasonable time has elapsed; *and suits shall be instituted against any carrier only within two years and one day from the day when notice* in writing is given by the carrier to the claimant that *the carrier has disallowed the claim* or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid. (Emphasis added.)

California Rules of Court.

Rule 977: The following rule was released December 12, 1973, after the supplement to the 1974 edition was printed. (Please insert under the cover page of the pocket supplement).

Adopted by the Supreme Court of California and the Judicial Council of the State of California. Effective Jan. 1, 1974.

Rule 977. Citation of unpublished opinions prohibited; exceptions

An opinion of a Court of Appeal or of an appellate department of a superior court that is not published in the Official Reports* shall not be cited by a court or by a party in any other action or proceeding except when the opinion is relevant under the doctrines of the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent. [*Adopted by the Supreme Court of California and by the California Judicial Council effective January 1, 1974.*]

DIVISION 3

Rules for Publication of Appellate Opinions Adopted by the Supreme Court of the State of California, effective January 1, 1964

Rule 976. [Publication of appellate opinions]

(a) [Supreme Court] All opinions of the Supreme Court shall be published in the Official Reports. [Adopted January 1, 1964.]

(b) [Standard for opinions of other courts] No opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports unless such opinion (1) establishes a new rule of law or alters or modifies an existing rule[1]

*This rule shall not apply to an opinion certified for publication prior to its actual publication.

[1]This criterion calls for publication of the relatively few opinions that establish new rules of law, including a new construction of a statute, or that change existing rules. This criterion does not justify publication of a fact case of first impression,

(This footnote is continued on next page)

(2) involves a legal issue of continuing public interest,[2] or (3) criticizes existing law.[3] [As amended effective January 1, 1972; previously amended effective November 11, 1966.]

(c) [Courts of Appeal and Appellate Departments] Unless otherwise directed by the Supreme Court, an opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports if a majority of the court rendering the opinion certifies prior to the decision becoming final in that court that it meets the standard for publication specified in subdivision (b). An opinion not so certified shall nevertheless be published in the Official Reports upon order of the Supreme Court to that effect. [As amended effective January 1, 1972; previously amended November 11, 1966.]

(d) [Superseded opinions] Regardless of the foregoing provisions of this rule, no opinion superseded by the granting of a hearing, rehearing or other judicial

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where a legal rule or principle is applied to a substantially new factual situation.

[2]This criterion requires that the legal issue, rather than the case or controversy, be of public interest and that the interest be of a continuing nature and not merely transitory. Public interest must be distinguished from public curiosity. The requirement of public interest may be satisfied if the legal issue is of continuing interest to a substantial group of the public such as public officers, agencies or entities, members of an economic class, or a business or professional group. An opinion which clarifies a controlling rule of law that is not well established or clearly stated in prior reported opinions, which reconciles conflicting lines of authority, or which tests the present validity of a settled principle in the light of modern authorities elsewhere may be published under this criterion if it satisfies the requirement that the legal issue be of continuing public interest.

[3]This criterion would justify publication of the rare intermediate appellate opinion which finds fault with existing common law or statutory principles and doctrines and which recommends changes by a higher court or by the Legislature.

action shall be published in the Official Reports. [Renumbered effective January 1, 1972.]

(e) [Editing] Written opinions of the Supreme Court, Courts of Appeal, and appellate departments of the superior courts shall be filed with the clerks of the respective courts. Two copies of each opinion of the Supreme Court, and two copies of each opinion of a Court of Appeal or of an appellate department of a superior court which the court has certified as meeting the standard for publication specified in subdivision (b) shall be furnished by the clerk to the Reporter of Decisions. The Reporter of Decisions shall edit the opinions for publication as directed by the Supreme Court. Proof sheets of each opinion in the type to be used in printing the reports shall be submitted by the Reporter of Decisions to the court which prepared the opinion for examination, correction and final approval. [Renumbered effective January 1, 1972; previously amended effective November 11, 1966.] *5 Cal. Jur. 3d Appellate Review § 559; Cal. Practice § 61:462; Witkin Procedure pp 396, 397, 468, 471, 499.*

28 U.S.C. § 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

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For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.